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Appl. No. 10/792,351
Docket No. 9567
Amdt. dated September 21, 2006
Reply to Office Action mailed on June 21, 2006
Customer No. 27752

SEP 21 2006

REMARKS

Claim Status

Claims 14 – 25 are pending in the present application. No additional claims fee is believed to be due.

Claims 1 – 13 are canceled without prejudice.

New Claims 15 – 25 have been added. The new claims are substantially similar to Claims 2 – 10 and 12 – 13, but depend from Claim 14.

Rejection Under 35 USC §102(b) Over Kokx et al. (US 3,706,311)

Claims 1 – 14 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Kokx et al., U.S. Patent No. 3,706,311 (hereinafter “Kokx”). Applicants respectfully traverse the rejection.

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628 (Fed. Cir. 1987). In the instant case, the Office Action states

Regarding claims 1, 11, and 14, Kokx teaches a tampon (20) and a tampon applicator (15) in combination for expulsion of said tampon (20) into a vaginal cavity of a female user, comprising . . . a fluid permeable bag (12), said tampon (20) being housed within said hollow interior portion of said tampon holder tube (15) in a pre-expelled position . . . (see marked figure 3 below).

(The Office Action, page 3, last paragraph – page 4, line 5). The Office Action depicts an expulsion force increaser and a side expulsion member on figure 3 of Kokx. (The Office Action, page 4, middle). Kokx refers to these elements simply as “the tip (18) of the inserter.” (Kokx, col. 6, line 60). Kokx does not expressly disclose the tip of the inserter as having any function.

Claim 14 of the present application discloses

A tampon and a tampon applicator in combination for expulsion of said tampon into a vaginal cavity of a female user, comprising:

said tampon applicator comprising a tampon holder tube;

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said tampon holder tube comprising a hollow interior portion, an interior surface, an exterior surface, a longitudinal axis, an outer perimeter, a first end dimensioned for insertion into said vaginal cavity, and a second end positioned oppositely to said first end;

said tampon holder tube comprising an end expulsion force increaser and a side expulsion member each positioned at said first end of said tampon holder tube, said tampon being housed within said hollow interior portion of said tampon holder tube in a pre-expelled position;

said tampon comprising a fluid permeable bag tampon and absorbent material loosely dispersed within said permeable bag; and

wherein a force to expel said tampon from said tampon holder tube has **a greater force to expel said tampon from said end expulsion force increaser than from said side expulsion member.**

(Emphasis added). Unlike the tip in Kokx, the end expulsion force increaser and the side expulsion member of Claim 14, in conjunction with other elements, may be “configured to laterally expand the tampon 20 during expulsion of the tampon from the tampon applicator 21.” (Page 5, sixth paragraph, last sentence of the present application). In one example, this lateral expansion of the tampon during expulsion is due to the fact that “[w]hen the axial force 40 is applied, the tampon 20 is pushed toward the first end 26,” and “[t]he end expulsion force increasers require a greater axial force 40 than the side expulsion members 31 to expel the tampon 20.” (Page 6, last paragraph, second sentence and fifth sentence, respectively, of the present application). Because the end expulsion force increasers provide more resistance to the axial expulsion force than the side expulsion members, the tampon may expand in a lateral direction. (See figure 2 of the present application). Kokx clearly does not teach that a side expulsion member provides less resistance to an axial expulsion force than a side expulsion member, and as a result, Kokx does not expressly teach each and every element of Claim 14.

“The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic.” *In re Rijckaert*, 9 F.3d 1531, 1534 (Fed. Cir. 1993). Inherency . . . may not be established by probabilities or possibilities. “The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999).

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In the instant case, the Office Action has provided no evidence that the inserter tip of Kokx inherently provides the same benefit as the end expulsion force increaser and side expulsion member of Claim 14. Turning to the figures of Kokx, there are no depictions of the tip of the inserter being configured such that it provides the same benefit as the end expulsion force increaser or side expulsion member of Claim 14. In fact, the Kokx tampon "is deformed, i.e., folded in half, so it has a substantially v-shape." (Kokx, col. 6, lines 33 – 34). This folded configuration also folds the leaf spring contained in the tampon, and as a result, "loads [the spring] with potential energy so that it biases the tampon legs toward an open position." (Kokx, col. 6, lines 39 – 42). Kokx clearly discloses a leaf spring as providing the means of lateral expansion of the tampon, not the tip of the inserter.

Therefore, because the Office Action has not shown that Kokx either expressly or inherently teaches each and every element of Claim 14, and because all other claims either depend from Claim 14 or depend from a claim that depends from Claim 14, Applicants respectfully request that the rejection under 35 U.S.C. §102(b) be reconsidered and withdrawn.

Claims 1 – 14 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 – 11 of copending Application No. 10/791,976. Applicants are willing to file a terminal disclaimer to obviate a provisional double patenting rejection upon allowance of patentable subject matter if still required.

Conclusion

This response represents an earnest effort to place the application in proper form and to distinguish the invention as now claimed from the applied references. Applicants respectfully request that the rejection of the claims be reconsidered in light of the arguments set forth herein, and that claims 14 - 25 be allowed. Early and favorable action in the case is respectfully requested.

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Respectfully submitted,

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